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In the Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

DAVID R. BABB,

Petitioner,

vs.

RAY MARELLI, TRUSTEE OF THE ESTATE OF HERBERT L. SARVER AND DOYLE D. SARVER d/b/a G. P. PERKINS, BANKRUPTS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioner, David R. Babb, respectfully prays that a Writ of Certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit in the above case.

REPORTS IN THE COURTS BELOW

The Referee's Original Order, dated April 24, 1968 (Appendix A), the Referee's Report, dated April 24, 1968 (Appendix B), the District Judge's Order on Petition for Review, dated June 18, 1968 (Appendix C) and the Referee's Amended Order, dated June 24, 1968 (Appendix D) were all considered by the Court of Appeals.

The Order of the Court of Appeals for the Seventh Circuit, dated February 27, 1969, sought to be reviewed is set forth in Appendix E.

None of the opinions are reported.

JURISDICTION

The Court of Appeals Judgment was entered February 27, 1969, and the Jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1) and 11 U.S.C. §47c.

QUESTIONS PRESENTED

Is it the intent of Section 64 of the Bankruptcy Act to give first priority to otherwise *reasonable* expenses of administration, even to the total exclusion of lower priority creditors?

Can continued competent administration of *small* and *difficult* bankruptcy cases be expected, if reasonable costs of administration are regularly denied solely because of insufficient assets?

Is the Administrative Office of the United States Courts imposing a statistical standard upon the Referees and Judges of the District Courts, which although not shown in the record of a particular case, results in judicial decision which makes *good statistics* rather than *good administration*?

Is there a new recurring important problem in the determination of costs of administration, since statistical performance is now under increased scrutiny, which should be considered by this Court at this time?

What philosophy of bankruptcy administration will best protect all classes of creditors in the *nominal assets estate?*

Is there a substantial conflict between the decisions of the Court of Appeals of the Seventh Circuit and decisions heretofore rendered in the Ninth Circuit?

Has the Court of Appeals of the Seventh Circuit failed to interpret an important question of Federal Statutory Law which should be settled by this Court?

STATUTES INVOLVED

Bankruptcy Act, Chapter VII.

Section 64(a) (11 U.S.C. §104) "The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of the bankrupt estates, and the order of payment shall be (1) the costs and expenses of administration . . ."

STATEMENT OF THE CASE

This case arises out of proceedings in bankruptcy under the Bankruptcy Act. In the Sarver estate, there were relatively few assets after ultimate disposition and compromise of claims.

The legal services required for administration consisted largely of setting aside many disputed secured claims, some of which matters were considered by the District Court on Petition for Review and then appealed

to the Court of Appeals before administration was completed. There literally were no unsecured non-exempt assets in the case except those discovered by the initiative of the Trustee and his Attorney.

At the time the Petition in Bankruptcy was filed and on the face of the Bankruptcy Petition, this case was typical of thousands of cases which are normally reported *no assets.* The Trustee in this case, through his attorney, critically reviewed the claimed liens and successfully contested the validity of a great majority.

As it turned out some large contested liens had to be compromised by the Trustee, simply because there was not sufficient value in the estate to justify further defense of appeals despite the fact that successive court decisions, had all been in favor of the trustee.

The amount of the fee for the Trustee's attorney is at issue. The Referee specifically found: "The Trustee and his attorneys worked long hard and successfully. There are no duplications of attorneys' fees". (Appendix B)

The findings of the Referee is interpreted to mean that the fee requested was fair and reasonable in every respect.

If that fee (and other fees not here at issue) were allowed, all of the assets of the estate would have been exhausted before paying claims of general creditors. The Referee disregarded priority and applied an arbitrary 30% reduction to all fees so that, as he reasoned, there would be enough money to pay a general creditor dividend of 20%. (Appendix B)

This matter was heard upon petition for review upon objection of both Attorney Babb and the Trustee, both of

whom had similar percentage reduction in requested fees. The District Court summarily restored the Trustee to his requested fee (which was the statutory amount) by granting a $250.27 increase and at the same time summarily reduced the fee of Attorney Babb by an additional $319.90 leaving the attorney a net fee of $1,000.00. The District Court therefore *found* the money to pay the statutory fee by further *reducing* the discretionary fee of the attorney who successfully brought the matter to the Court's attention, leaving the dividend to general creditors essentially unchanged. (Appendix C).

The Court of Appeals affirmed the increase in the Trustee's fee and ordered the $1,319.90 attorney's fee reinstated. That Court, after fully reviewing the Referee's reasoning, made a specific finding confirming the reasonableness of the originally requested $4,733.00 attorney's fee by stating "There is no cause to believe that the claims [for service] were not otherwise proper and allowable in full." (Appendix E).

ARGUMENT

The Petitioner comes to this Court as a young lawyer, but none the less experienced and knowledgeable in the mundane and difficult phases of *nominal asset case* bankruptcy administration.

The small amount of fees at stake here are of incidental importance compared to the impact that an appropriate decision in this case could have upon the practice of bankruptcy administration by able lawyers in small communities.

The Petitioner believes that the proper purpose and philosophy of the Bankruptcy Act, briefly stated, is that all of the assets should be collected and that all improperly secured liens should be set aside and that assets should be distributed to creditors according to their priority.

The Petitioner believes that important classes of priority claims, including state and local taxes and federal taxes, should be given consideration and that satisfactory administration of an estate may be accomplished if some or all of these priority claims are paid without any payment whatsoever to general creditors. The Petitioner believes, as a matter of policy, that it is important that a maximum number of bankruptcy cases be administered, even though in a certain percentage there are no dividends to general creditors.

The Petitioner contends that in view of the infrequency that the question of *nominal estate cases* comes before the Supreme Court, and in view of the great frequency with which the question of administrative expenses must be decided by referees throughout the country in the day to

day administration of bankruptcy cases, it is desirable that this Court consider the question presented and make a specific finding to the effect that Section 64 of the Bankruptcy Act requires that expenses of administration, including fair and reasonable attorney's fees, be paid as a *first priority expense in advance of the payment of dividends to creditors,* even though no assets remain for distribution to general creditors.

The Petitioner knows from experience that ten or twenty percent of the so called *nominal asset cases* turn out to have hidden assets and that by diligently pursuing these cases, excellent results can be achieved and that ultimately some cases are raised above the *nominal asset case* level and dividends are paid to creditors. Necessarily, an attorney handling this type of case is underpaid if he only realizes a fee on one out of five cases, but the unfairness is compounded when his fee is further cut to one-third or one-fourth of a fair and reasonable fee in the occasional case where he is successful. Diligent administration of nominal asset cases should be encouraged to carry forth the intent of the Bankruptcy Act.

The Petitioner recognizes and asks the Court to recognize that there are certain justifiable instances when, after applying priorities in proper order, the money runs out and there are not sufficient funds to pay all priority claims prior to general creditors.

The Petitioner contends that this occurs most frequently in the *nominal asset cases,* and that the *nominal asset cases* are the majority of bankruptcy cases which are or ought to be administered even though they are by far the minority of cases reviewed by a higher court.

The Petitioner believes that reasonable expenses incurred by the Trustee in accomplishing these purposes should be

paid as a priority claim in accordance with statute. The Petitioner does not attempt to define reasonable, for there has never been any contention in the present case that the fees requested are not fair and reasonable in every respect.

The Petitioner does contend, however, that when this standard of reasonableness of fees for administration has been met that all of those fees should be paid in full as priority claims under the statute.

The Petitioner believes that the philosophy of the courts below results in attorneys and trustees ignoring potential assets and reporting *nominal asset cases* as *no asset cases* for the purpose of avoiding administration.

Petitioner believes the Court through its Administrative Office now reviews the statistics on *Bankruptcy Cost Studies* and *blindly approves* them each year, saying *this is good,* not realizing that the failure to administer many reported *no asset* cases is detrimental to the rights of all classes of creditors. According to the practice in bankruptcy courts today, fraud by debtors has little chance of being detected if the debtor's petition shows *no assets* on its face. There is no longer a system of checks and balances because in many *nominal asset cases* there is no administration.

Petitioner believes that U. S. Supreme Court through its Administrative Office, all of which is nowhere a part of the record in this case, has promulgated statistics and administrative orders which have had the effect of encouraging a majority of the Referees and Judges in the Northern District of Illinois and elsewhere to attempt to make all bankruptcy cases fall into certain pre-established norms. The statistics look good but they look good only because *high expense* cases are not administered.

In the case at hand, both the Referee in his finding that "the trustee and his attorneys worked long, hard and successfully. There were no duplication of attorneys' fees" (Appendix B) and the Court of Appeals by its finding "there is no cause to believe that the claims [for service] were not otherwise proper and allowable in full" (Appendix E) have made specific findings that the fees were fair and reasonable.

The Court of Appeals in the Ninth Circuit, on a similar set of facts, held

> "We think that the economical spirit of the Bankruptcy Act does not require, nor justify, reducing a requested fee where, as here, by all other proper standards, it is a fair and reasonable one . . . "
>
> *Jacobowitz* v. *Double Seven,* 378 F. 2d 405, 9th Cir. 1967.

By substituting the words "success achieved" for "economical spirit of the Bankruptcy Act" the Court of Appeals for the Seventh Circuit come to an exactly opposite conclusion disallowing fees which it further finds "there is no cause to believe . . . were not proper and allowable in full." (Appendix E). Amazingly enough the Court of Appeals for the Seventh Circuit cite as authority the *Jacobowitz* case in the Ninth Circuit with which they are in conflict.

The statutory language with respect to priority was expanded and clarified in 1962. The Statute now clearly eliminates any ambiguity which existed in the past by stating:

> "*The debts to have priority in advance of the payment of dividends to creditors,* and to be paid in full out of the bankrupt estates, and the order of payment shall be (1) *the costs and expenses of administration* . . . " (emphasis added).
>
> Bankruptcy Act, Section 64 (a); 11 U.S.C. §104.

It is Petitioner's primary contention that the Court of Appeals of the Seventh Circuit has clearly made a decision that is completely contrary to the clear meaning of the statutory language. Priority must be recognized once the fees have been found to be fair and reasonable. No other interpretation is possible.

The Statute is in need of interpretation and this Court is asked to make a finding that the priority of debts required by the 1962 revision of Section 64 of the Bankruptcy Act be given full force and effect.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

DAVID R. BABB, *pro se*
Petitioner